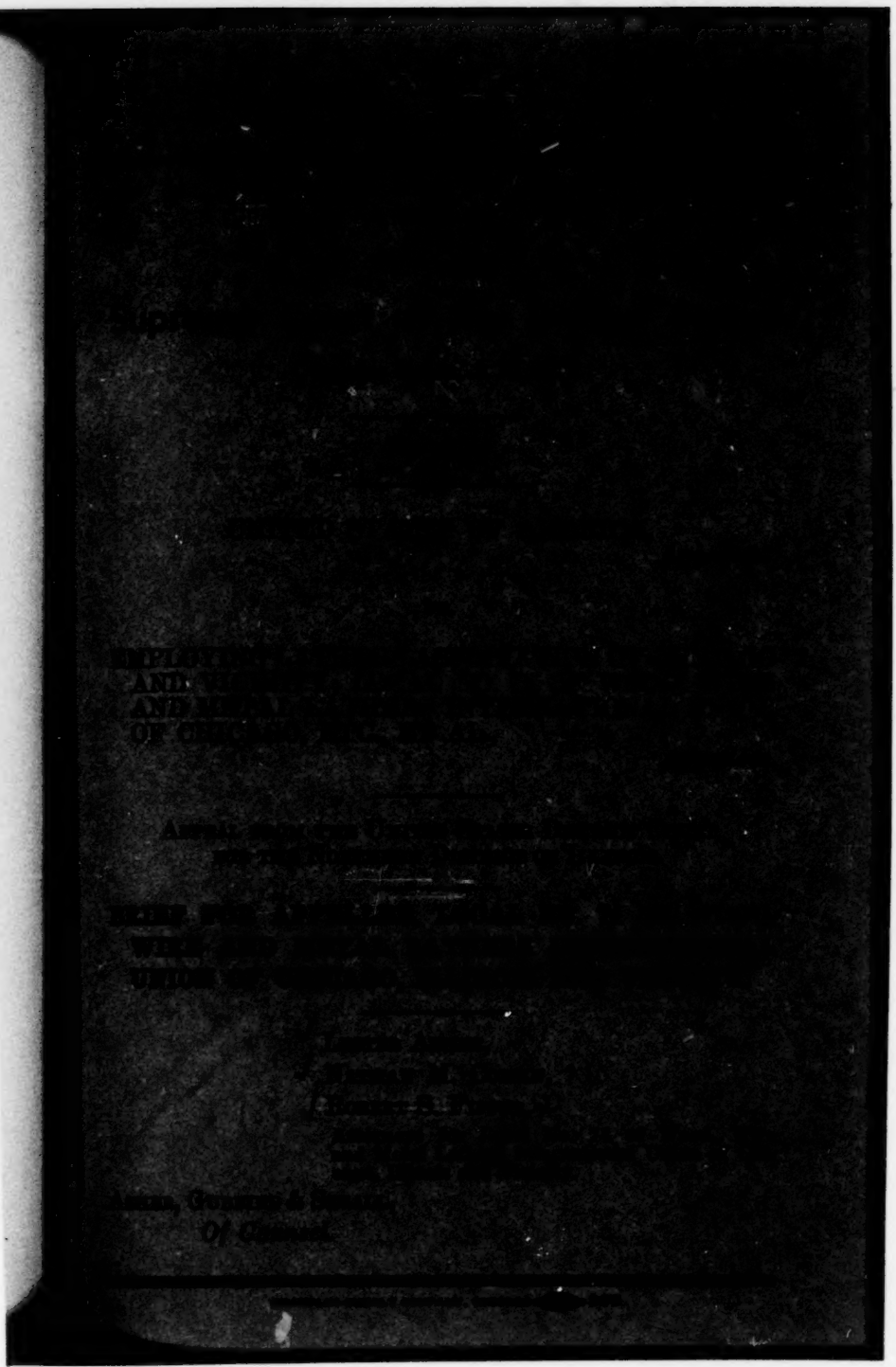

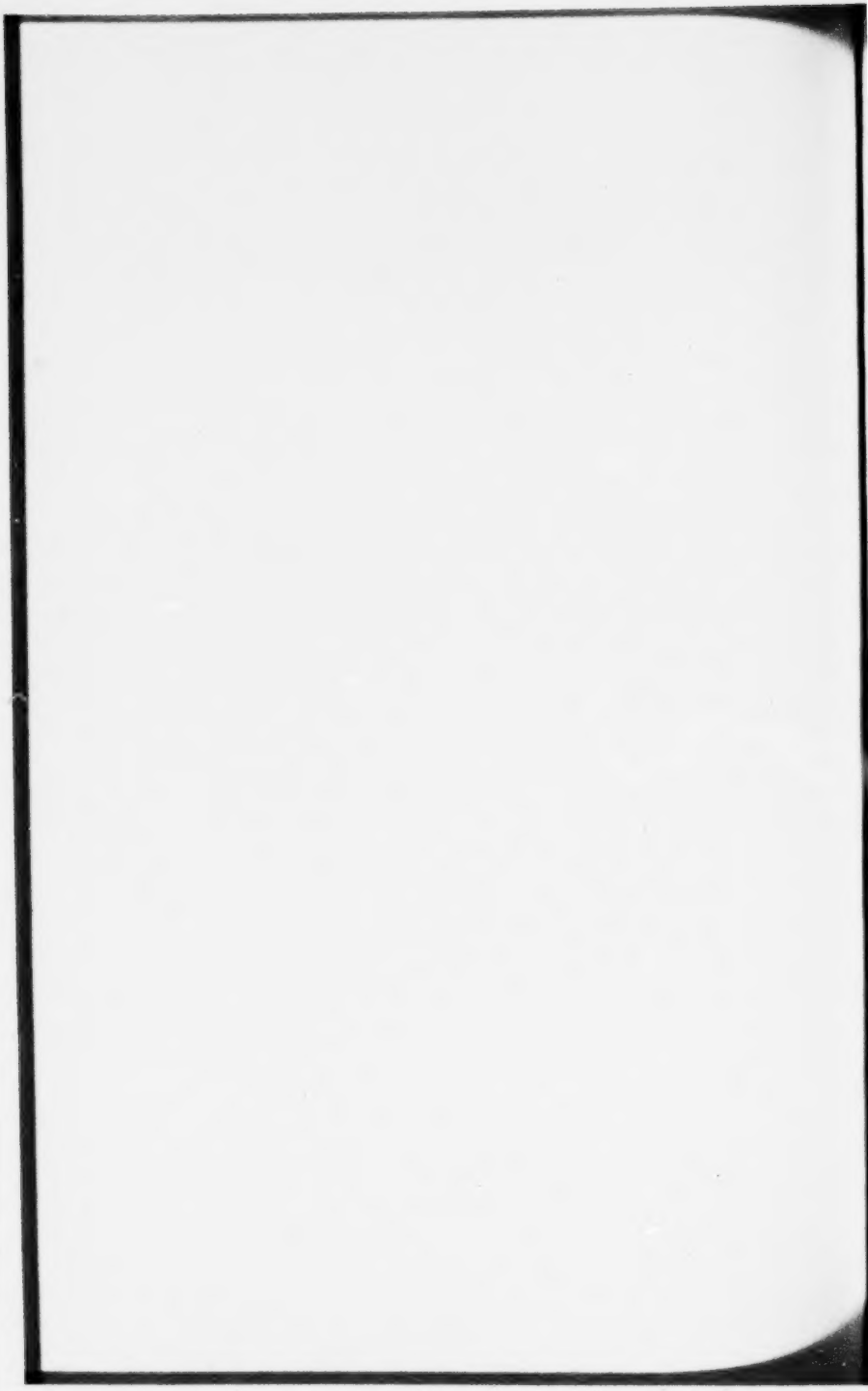

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1953.

No. 439

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEE, LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY.

OPINION BELOW.

The opinion of the District Court (R. 21) is not yet reported.

JURISDICTION.

This Court has jurisdiction in this appeal by virtue of Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29 as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

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QUESTION PRESENTED.

The complaint alleges an agreement between a local union and a local employers' organization to "suppress competition" in the intrastate market for the employers' services. The parties to the agreement work with, but never own, materials originating in other states. The parties use the materials in constructing improvements on Illinois real estate. The complaint does not allege that anything the parties have done was intended to or did in fact restrain the alleged interstate flow of materials into the local area.

The question presented is whether the complaint states a claim against the union and the employers' organization for which relief can be granted under Section 1 of the Sherman Act, solely because some of the materials used by the parties originate in other states.

STATUTES INVOLVED.

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 1.]
>
> * * * * * *
>
> Sec. 4 [as amended by the Act of March 3, 1911, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United

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States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

* * * * * * *

The Act of October 15, 1914, 38 Stat. 730, known as the Clayton Act, provides in part as follows:

Section 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. [15 U. S. C. 17.]

STATEMENT.

All appellees have collaborated on the statement of the case presented which appears in the brief of our co-appellees. In order to conserve the time of the Court, we adopt that statement and incorporate it herein by reference.

SUMMARY OF ARGUMENT.

The trial court was correct in dismissing the complaint because it failed to allege that the conspiracy charged was intended to or did in fact restrain interstate commerce.

A. The conspiracy charged is stamped only with an intrastate character. The parties to it are all residents of Illinois and do not deal, among themselves or with others, across state lines. Cf. *United States* v. *Frankfort Distil-*

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leries, Inc., 324 U. S. 293. Appellees are not alleged to be themselves engaged in or a part of interstate trade in lathing materials, the only interstate commerce allegedly involved here. Their only contact with interstate commerce is that some of the materials used by them, originated in other states. See *Hopkins* v. *United States*, 171 U. S. 578.

B. Appellees have, at every stage of this proceeding, admitted that interstate commerce *may* be restrained by wholly intrastate activity. Hence, it is of no real consequence whether or not lathing materials are "in commerce" until they reach the employing lather. The relevant inquiry is whether the complaint alleges that this local conspiracy is intended to do or does in fact restrain, within the meaning of the Sherman Act, the interstate flow of lathing materials. *United States* v. *Women's Sportswear Assn.*, 336 U. S. 460, 461; *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 232. Assuming *arguendo*, that the conspiracy alleged was intended to and did in fact effect restraints on the intrastate market for lathing work, the complaint would still fail to state a claim for relief under the Sherman Act unless it further showed that there was imposed on the interstate flow of lathing materials the kind of market restraint at which the Sherman Act is aimed. *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 338; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 233.

C. The complaint ascribes to the local conspiracy only a local aim, and, as is shown, no "consequences" from which an intention to restrain interstate commerce may be presumed. Cf. *United States* v. *Patten*, 226 U. S. 525.

D. The complaint fails to allege that the local conspiracy does in fact restrain the interstate commerce allegedly involved. The allegations of effect in *Mandeville Farms* v.

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American Crystal Sugar Co., 334 U. S. 219, 226, were far more specific than those in the instant complaint. The complaint fails to allege that anything appellees have done has had any effect whatever on the entry, the volume, the price, the quality, competition in the sale, purchase or distribution of lathing materials and other building materials flowing into Illinois in interstate commerce. Cf. *Local 167* v. *United States*, 291 U. S. 293. The mere conclusion that anything which interferes with the performance of lathing work "necessarily and directly" restrains interstate commerce in lathing materials cannot substitute for the allegation of some actual and factual effect. Nor is it in accord with this Court's pronouncements as to the intent and scope of the Sherman Act in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

E. Even if the complaint alleged a diminution of the interstate flow of lathing materials, which it does not do, such an indirect, incidental and remote effect of a locally-aimed conspiracy is beyond the intent of the Sherman Act. *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. If, therefore, appellees are not alleged to have gone as far as the defendants in the foregoing cases, *a fortiori* the instant complaint fails to state a claim for which relief can be granted under the Sherman Act.

F. A decision here that a local employer-union combination with purely local aims violates the Sherman Act simply because the materials with which the parties work, but do not own, originate in other states, without requiring an allegation that the combination does in fact restrain interstate trade in those materials, would virtually emasculate the limited Clayton Act exemption remaining after *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797. To make the availability of the Clayton Act exemption to this appel-

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lee dependent solely on whether the local employer-union combination uses materials originating in other states is tantamount to holding that local building tradesmen and local building trades unions are themselves engaged in and a part of interstate commerce.

I.

THE COMPLAINT FAILS TO ALLEGE A RESTRAINT OF INTERSTATE COMMERCE.

> "We first should be satisfied that the activities on which restraints are alleged to have been exerted constitute commerce among states." *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 461.

A. The Combination Alleged Is Purely Local.

The complaint alleges (par. 3, R. 2) that each of the appellees is located and does business in the "Chicago area." All allegations relating to the substance of the charge are limited to the "Chicago area," which is defined (par. 7, R. 3) to include "most of Cook County and portions of DuPage and Lake Counties, Illinois."

The complaint alleges certain agreements among the appellees which concern the service rendered by employing lathers [1] in the Chicago area and the conditions under which the members of this appellee-union will work for employing lathers. The service provided by the employing lathers is performed entirely within the State of Illinois, and both the employing lathers and those with whom they contract, reside and work solely within the state. Nothing is alleged to indicate that any of the parties, in their activities alleged in the complaint, have dealt with each other across state lines, or have dealt with anyone else residing or doing business outside the State of Illinois.

[1] In common with our co-appellees, we consider the term "lathing contractors" to be an inaccurate description of the function of the employing lathers, and shall refer to them herein as "employing lathers."

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The only contact between appellees and interstate commerce, which the complaint alleges, is that some of the materials furnished by the plastering contractors to the employing lathers originated in other states.

The Government wisely does not proceed on the premise that the appellees are themselves engaged in or a part of interstate commerce, for it is clear that they are not.[2] See *United States* v. *Oregon State Medical Society*, 343 U.S. 326.

An analogous situation was considered by this Court in *Hopkins* v. *United States*, 171 U.S. 578, wherein there was a combination of commission merchants at the Kansas City stockyards which prescribed the commissions to be charged for selling livestock consigned to the defendants from cattlemen in other states. The Court held that this combination did not violate the Sherman Act, stating at page 591:

> "Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade."

In *Browning* v. *Waycross*, 233 U.S. 16, this Court held that a Georgia resident engaged in the business of erecting lightning rods which originated in Missouri, was not engaged in interstate commerce. At page 22 the Court said:

> "* * * such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete an interstate commerce trans-

[2] The Government's determination to drop its charge of monopolization (see footnote 2, Brf. 4) is a tacit admission of this point.

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action, but concerned merely the doing of a local act after interstate commerce had terminated."

See also *Kansas City Steel Co.* v. *Arkansas,* 269 U.S. 148; *Anderson* v. *Shipowners' Association,* 272 U.S. 359, 363-364; *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 228-233; Cf. *United States* v. *Hutcheson,* 312 U.S. 219, particularly concurring opinion of Mr. Justice Stone, at pages 237-243; *United States* v. *Building and Construction Trades Council, et al.,* 313 U.S. 539; *United States* v. *United Brotherhood of Carpenters and Joiners of America, et al.,* 313 U.S. 539; *United States* v. *International Hod Carriers and Common Laborers' District Council, et al.,* 313 U.S. 539, affirming *United States* v. *Carrozzo,* 37 F. Supp. 191 (N.D. Ill., E.D.).

There is nothing alleged in the complaint which detracts from the conclusion that the combination alleged is purely local, and that the parties to it are not themselves engaged in interstate commerce. It is clear, therefore, that in order to plead a violation of the Sherman Act, it was incumbent upon the appellant to allege that the local activities of the appellees are intended to, or do in fact have the effect of, restraining interstate commerce in lathing materials. *United States* v. *Women's Sportswear Assn.,* 336 U.S. 460, 461. See *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 547.

B. The Purposes Alleged Are Purely Local. No Intention To Restrain Interstate Commerce Is Alleged.

The complaint carefully, and with considerable art, avoids alleging any intention on the part of the appellees to restrain interstate commerce. Paragraph 19 of the complaint (R. 6) alleges that appellees "* * * have engaged in an unlawful combination and conspiracy *to suppress competition among lathing contractors in the Chicago area, and to restrict and exclude persons from engaging in the*

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lathing contracting business in said area * * *." These purely local aims are the only purposes attributed to the appellees.

Paragraph 20 of the complaint (R. 6) which sets forth the terms of the alleged combination and conspiracy nowhere mentions any intention on the part of appellees to restrain the interstate flow of lathing materials and related building materials. Nor do paragraphs 21 through 28 of the complaint (R. 7-9) anywhere allege that the intention, object, or aim of the alleged combination and conspiracy was to restrain such interstate commerce. In fact, nowhere does the complaint speak of any intention on the part of appellees to restrain the interstate flow of lathing materials and related building materials, which is the only interstate commerce referred to anywhere in the complaint.

In *Industrial Association* v. *United States*, 268 U.S. 64, the Court said (p. 77) of a combination of building trades employers whose purpose was to compel all San Francisco building contractors to adhere to the "open shop," by allowing only those contractors who cooperated to obtain materials and supplies:

> "* * * Interference with interstate trade was neither desired nor intended. * * * The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. * * *"

In *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, it was charged that the defendant union had interfered with the performance of structural steel construction work in New York City for the purpose of compelling contractors to adopt the "closed shop." This Court affirmed dismissal of the bill as failing to state a claim under the Sherman Act, stating (p. 107):

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> "* * * the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim."

In *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, the Court squarely established that an intention to restrict the interstate movement of goods, standing alone, does not constitute an intention to restrain interstate commerce within the meaning of the Sherman Act. Since no intention to restrict interstate movement is alleged here, appellees are not even alleged to be as close to violating the Act as the defendants in the *Apex* case had been proved to be.

Thus, it is clear that the complaint alleges no intention on the part of appellees to restrain interstate commerce.

C. The Complaint Does Not Allege that Appellees' Activities Have in Fact had the Effect of Restraining Interstate Commerce.

Since the complaint ascribes only local aims to the appellees and fails to allege any intention to restrain interstate commerce, or any other aim from which such an intention may be inferred, the complaint can be sufficient in law only if it alleges facts showing that the effects of the appellees' activities upon interstate commerce were such as to restrain that commerce directly and substantially.

It may be stated categorically that the complaint does not allege one fact showing that any of the activities of the appellees at any time obstructed, interrupted, hindered, impeded, burdened, restrained, disrupted or in any way affected interstate commerce in lathing materials.

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The effects alleged are set forth in paragraph 29 (R. 9) of the complaint.[3] Of the five effects listed, four relate only to intrastate commerce.[4]

Assuming, *arguendo*, that the conspiracy alleged was intended to and did in fact effect restraints on the intrastate market for lathing work, the complaint would not state a claim for relief under the Sherman Act unless it further showed that there was imposed on the interstate flow of lathing materials the kind of restraint at which the Sherman Act is aimed. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 338; *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 233.

Only one of the effects alleged relates to the interstate commerce said by appellant to be involved in this action. Sub-paragraph 29 (e) states: "Interstate trade and commerce in lathing and related building materials has been unlawfully restrained." Nowhere in the complaint is there a single allegation of fact supporting this broad conclusion.

---

[3] "29. The effects of the aforesaid combination and conspiracy, among others, have been as follows:

(a) The number of lathing contractors in the Chicago area has been reduced from approximately 95 in 1925 to approximately 36 at the present time and the right of union contractors to hire union journeymen lathers and apprentices has been unlawfully restrained and impeded;

(b) Competition among lathing contractors in the Chicago area has been unlawfully restrained and the traditional American right of a person to enter into a business of his own choice without hindrance of illegal restraints of trade has been impaired and thwarted;

(c) The cost of building construction in the Chicago area has been artificially and illegally increased;

(d) The public has been denied the benefits in the construction industry in the Chicago area which would result from competition free from the illegal restraints in the lathing phases of the building construction industry;

(e) Interstate trade and commerce in lathing and related building materials has been unlawfully restrained."

[4] It should be noted that the conclusion in paragraph 29 (c) that "The cost of building construction in the Chicago area has been artificially and illegally increased;" is unsupported in the complaint. No charge is made that the prices of lathing work or materials or plastering work or materials have been increased as a result of anything the defendants are alleged to have done.

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The complaint does not allege that anything appellees have done:

> (a) physically restrained the entry (Cf. *Local 167* v. *United States,* 291 U.S. 293);
>
> (b) reduced, increased or affected in any way the volume (Cf. *N. L. R. B.* v. *Denver Bldg. Council,* 341 U.S. 675);
>
> (c) raised, lowered, influenced or in any way affected the price (Cf. *Mandeville Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219 and *United States* v. *Women's Sportswear Assn.,* 336 U.S. 460);
>
> (d) raised, lowered, influenced or in any way affected the quality;
>
> (e) restricted competition in the sale (Cf. *Local 167* v. *United States, supra*);
>
> (f) restricted competition in the purchase (Cf. *Local 167* v. *United States, supra*), or
>
> (g) restricted competition in the distribution (Cf. *Local 167* v. *United States, supra*),

of lathing and other building materials flowing into Illinois in interstate commerce.

If the complaint alleges no physical restraint, no effect on quantity, price, quality, competition in sale, competition in purchase, competition in distribution, where can it be said that it alleges a restraint on interstate commerce in lathing and building materials coming into Illinois?

In an effort to fill this void, appellant relies on paragraph 18 of its complaint (R. 5). That paragraph is as follows:

> "*Any* restraint upon or disruption in or interference with the performance of lathing work in the Chicago area *necessarily* and *directly* restrains and affects the interstate flow of lathing materials and also constitutes a direct and substantial burden and restraint upon the interstate flow of all of the hereinbefore referred to building materials and appurtenances entering into the construction of buildings in the Chicago area." (Emphasis added.)

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A bald conclusion of this nature is not, of course, admitted by a motion to dismiss. *Newport News Shipbuilding and Drydock Co.* v. *Schauffler,* 303 U.S. 54, 57; *United States* v. *Yellow Cab Co.,* 332 U.S. 218.

Paragraph 18 is a cornerstone of the Government's complaint. It is this broad, all-inclusive supposition, that *anything* which interferes with the performance of lathing work restrains interstate commerce in lathing materials and other building materials *per se,* on which the Government bases its complaint. Without dwelling on the fact that the complaint does not allege any interference with the performance of lathing work, the failure to allege any actual or factual effect of the defendants' activities upon interstate commerce in lathing materials is patent.

Since the complaint in issue fails to allege any facts showing that the activities of the appellees have in any way had the effect of restraining interstate commerce in lathing materials and building materials, and since we have already established that the complaint does not allege that appellees intended to restrain interstate commerce, it follows that the complaint is fatally defective, *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 233, and was properly dismissed by the trial court.

D. The Complaint Would Be Insufficient Even if it Alleged a Diminution of the Interstate Flow of Lathing Materials Resulting from Appellee's Locally Aimed Activities.

Cases involving the Sherman Act consistently require direct and substantial restraints of interstate trade, rather than remote and incidental restraints on interstate trade and commerce. Assuming *arguendo,* that the complaint had alleged facts showing that as a result of the local appellees' locally-aimed activities the volume of lathing and building

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materials coming into the Chicago area from other states had been diminished, it would still fall short of alleging direct and substantial restraints violating Section 1 of the Sherman Act.

A case in which a rigid system of control was imposed upon a local construction industry was *Industrial Association* v. *United States,* 268 U.S. 64. That case involved a local combination which required builders to obtain permits for the purchase of building materials from the Builders' Exchange, and by refusing such permits, forced all builders to operate on the "open shop" plan of employment. Some of the material controlled by this plan was plaster which originated outside of the State of California. Despite a finding by the trial court (pp. 76-77) that the requirement of permits "interfered with and prevented the free movement of building materials and supplies from other states into California," this Court reversed the trial court's order granting an injunction against the Industrial Association, stating (page 80) that the effects of the conspiracy:

> "* * * went no further than to take away the * * * (local contractor's) opportunity to use, and therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote, * * *."

Continuing, the Court stated at page 82:

> "* * * if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

Thus even where a trial court has found proven effects more substantial and more direct than those which the Government hints at but does not allege in the instant complaint, this Court has refused to invoke the Sherman Act.

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Especially applicable to the allegations in the complaint herein, is the following language of the Court in the *Industrial Association* case (page 84):

> "To extend a statute intended to reach and suppress real interferences with the free flow of commerce among the states to a situation so equivocal and so lacking in substance, would be to cast doubt upon the serious purpose with which it was framed."

Similarly, *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, held that curtailments of shipments in interstate commerce as a result of the local means employed by a local conspiracy with local aims is beyond the reach of the Sherman Act. In that case it was alleged that:

> "• • • all the steel used by petitioners • • • is transported from other states • • •; that the purpose and intent of respondents is to prevent the use of said steel • • • wherever erected by petitioners; that the effect of the success of respondents would be • • • to destroy the interstate traffic of petitioners in steel." (pp. 106-107.)

This Court held that such effects, which go far beyond those alleged in the instant complaint, were not such as could invoke the Sherman Act, stating at page 107:

> "All this, however, is no more than to say that respondents' interference with the erection of the steel in New York will have the effect of interfering with the bringing of the steel from the other states. • • •"

As in the *Industrial Association* case the effect of the conspiracy was to prevent the purchase and shipment of materials from other states. Yet, the Court in the *Levering* case held (page 107) that:

> "• • • Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not

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> the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. * * * If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and therefore not within the Anti-Trust Acts * * *."

In *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, the Court said at page 547:

> "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. * * * But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. * * *"

It is thus clear that the complaint at bar would be insufficient, even if it contained complete factual allegations showing that the volume of lathing and building materials flowing into the Chicago area had been sharply curtailed as a result of the local appellees' locally-aimed activities. For even if such were the case, the conspiracy would not have imposed on the interstate market for lathing materials the type of restraint at which the Sherman Act is aimed.

The activities of the defendants in the *Industrial Association* and *Levering* cases were held to be beyond the intent of the Sherman Act. This Court, the Government to the contrary (Brf. 31), has recently indicated that it still deems these cases illuminating, *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 339; *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 293, 297. The Government here asks the Court to overturn those decisions on purely semantic grounds. Since the *Levering* and *Indus-*

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trial Association cases were decided, the Government has developed new names for some old activities. Contractors and workmen in the building trades are now described variously as "conduits" (Complaint, paragraph 15; R. 5), "terminal outlets" (Brf. 12) and "outlets for entry" (Brf. 26). The activities have not changed. Only the labels are new. Local building tradesmen worked with materials originating in other states in 1925, when the *Levering* case was decided, in 1933 when the *Industrial Association* case was decided, and they do today. The use of the terms "conduit," "terminal outlet" and "outlets for entry" has not changed the *facts*.

If, therefore, as has been shown, appellees are not alleged to have gone as far as the defendants in the earlier cases cited, *a fortiori* their alleged activities should not now be held to be within the intent of the Sherman Act.

II.

THE GOVERNMENT'S BRIEF HAS NOT IMPROVED ITS COMPLAINT.

A. The Government's Brief Does Not Explain Away the Failure of the Complaint to Allege that Appellees Conspired with the Intention of Restraining Interstate Commerce.

The trial court found that the complaint contained "* * * no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy." The Government cites (Brf. 28-29) *United States* v. *Patten*, 226 U.S. 525, 543 for the proposition that " 'no allegation of a specific intent to restrain' interstate commerce is necessary" and that "those charged with conspiracy 'must be held to have intended the necessary and direct consequences of their acts'."

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Admitting this to be the law, it must follow that the presumption will not become operative unless the consequences of the appellees' acts are alleged in the complaint. It is the consequences—the effects on interstate commerce —which have not been pleaded in the instant complaint. Hence, there is nothing alleged from which an intent to restrain interstate commerce in lathing materials may be inferred.

B. The Government's Brief Does Not Explain Away the Failure of the Complaint to Allege that the Alleged Conspiracy in Fact Restrained Interstate Commerce.

In Section A of its argument, which section is entitled, "The Lathing Materials Shipped From States Other Than Illinois Remain In Interstate Commerce Until They Reach The Lathing Contractors For Whom They Are Destined." appellant seeks to establish that the lathing materials in the hands of appellees are articles "in" interstate commerce. The theory is that lathing materials, like paper cups (Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564) or gasoline (*Cf. Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231) are finished products, sold and distributed through local wholesale outlets (the building material dealers) and local retail outlets (the plastering contractors) to individual purchasers (the general contractors or the building buyers).

The complaint itself shows the basic fallacy of the theory.[6] The Government in its brief (p. 2) erroneously asserts that its complaint alleges that the employing lathers contract to *furnish* as well as install lathing materials. This assertion misrepresents the complaint which is explicit (par. 8, R. 3; par. 12, R. 4) that the lathing ma-

[6] The bald conclusion that general contractors or building owners are the ultimate purchasers of lathing materials is, of course, not admitted by the motion to dismiss.

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terials are furnished by the plastering contractors to the employing lathers. This is done so that the plastering contractors may fulfill their contracts for the construction of walls in buildings. The employing lathers hire lathers to use (or consume) these materials in the construction of walls. Once the materials have reached the plastering contractors, they are never again articles of commerce, interstate or intrastate. For it is the function indeed the contractual obligation of the plastering contractors, with the aid of the appellees, to destroy the individual characters and identities of the materials by moulding them into walls of Illinois buildings and thus to make them a part of Illinois real estate. See *White Way Sign Co.* v. *Chicago Title and Trust Co.*, 368 Ill. 483; *Dooley* v. *Crist*, 25 Ill. 453; *Fifield* v. *Farmers National Bk.*, 148 Ill. 163.

Into these walls go not only lathing materials, but lumber, nails, plaster, and the skills of all the contractors, supervisors, and laborers involved. Lathing materials, once they have been installed by appellees, no longer exist as such. Lathing materials are consumed in the building of walls just as an artist "installs" paint in the "construction" of a painting. It would seem far-fetched to describe a collector who purchases a painting at the local gallery as the "ultimate purchaser" of the paint. It seems equally far-fetched to describe a general contractor or home buyer as the "ultimate purchaser" of lathing materials. (See Complaint, par. 8, R. 3.)

The best judicial articulation of this point which this appellee has found is in the opinion of Judge Yankwich in *United States* v. *San Francisco Electrical Contractors Ass'n.*, 57 F. Supp. 57 (D. C., N. D., Calif. S. D.). If the term "plastering contractor" is substituted for the term "electrical contractor," the following excerpt from page 65 of that opinion is seen to fit perfectly the instant case.

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"But the contractors *did not sell* electrical supplies to the public or to general contractors. They built, what the indictment calls, 'electrical systems,' which it defines as 'that *combinatoin* of electrical equipment by which electric current is carried into and distributed through residences, apartment houses, and other types of buildings within the San Francisco Bay Area.' (Italics added.)

"Many of the articles which went into the construction of these systems originated in interstate commerce. They were shipped by the manufacturers to their agents, upon whose local shelves they rested until purchased by electrical contractors to be used in assembling or building the electrical systems.

"At times, some articles were shipped direct from the manufacturers to a contractor. But this was done through the local sales agent, who billed the contractor for them.

"Adopting a broad view of the doctrine of the continuity of the flow in interstate commerce (*Local 167 of I. B. of Teamsters, etc.* v. *United States,* 1934, 291 U. S. 293, 297, 54 S. Ct. 396, 78 L. Ed. 804), there is no such continuity here.

"*The electrical contractor does not buy articles in interstate commerce for resale. He buys them locally, for his own use in building electrical systems.*

"When he bids on a job, he agrees to install an electrical system. His charges are for the completed system. Into the making of his price go electrical articles, cost of the labor of others, his own engineering skill in installing the various parts and combining them into a working whole, his own cost of doing business, and his profits of management.

"In other words, the electrical contractor processes the electrical articles into a combination which he sells at a price, in which enters, *as only one* of the elements, the price of the articles.

"When articles originating in interstate commerce thus become commingled in a locally completed process, *they are not* in the flow of commerce.

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"The continuity is broken, if not when they reach the shelves of the manufacturer's agent, *at the latest when they are purchased from* him by the contractor, not for resale, but for processing.

• • • • • •

"If processing and control before an article enters interstate commerce, although 'preparatory to interstate sale and shipment' is outside of that commerce. (See *Parker* v. *Brown*, 1943, 317 U. S. 341, 361, 63 S. Ct. 307, 318, 87 L. Ed. 315), why should 'processing' after the interstate journey is at an end be treated differently?[3] "

Footnote 3, added by Judge Yankwich, appears at pages 65 and 66 of the opinion and states in part as follows:

"By 'processing' I really mean 'construction.'

"In the strictly 'processing' cases, there is no 'building' of a system. There is but a change in an object which continues to retain its identity, such as the slaughtering and dressing of chickens, the dressing of furs, the grinding of a lens from a lens blank, or the cleaning, stemming or packing of raisins.

• • • • • •

"Here there is the construction of a system, which in its very making became a part of a building to which it was attached. By the law of fixtures, it became a part of the land on which the building stood. Certainly, the 'system' could not be the object of interstate commerce, for it was never in it. It came into being locally in the state, and never had a detached existence, rendering it capable of *being traded in interstate commerce,* although some of its parts originated in it."

Appellees, who are not purchasers of lathing materials, are a step further from interstate commerce in the materials than are the plastering contractors.

While it is recognized that this district court decision is not controlling, it is respectfully submitted that the analysis quoted is sound and should prevail in the instant cause.

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This point was fully understood by the trial court, which said in its opinion: (R. 23)

> "Whatever restraint there is occurs after all the buying and selling is completed. The flow of commerce is not unlike the flow of water, and the statute is designed to prevent a break in the pipes through which interstate commerce flows across state lines and to the consumer. The statute is not designed to apply to the use the consumer makes of the articles of commerce after the consumer has completed his purchase, unless the consumer creates a new product and a new stream of commerce that again crosses state boundary lines."

The error of the Government's theory is clear. Appellees are not "conduits," "terminal outlets," or "outlets for entry" of lathing materials or anything else. They are builders of walls and ceilings.

Having argued that lathing materials are in commerce, or as the Government phrases it, have an "interstate character" in the hands of the appellees, the Government next admits that it makes no difference whether or not the lathing materials are in interstate commerce, citing *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464; *Local 167* v. *United States*, 291 U.S. 293, 297; and *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, for the patent proposition that it is not necessary to determine the precise point at which interstate commerce ends and intrastate commerce begins.

Admittedly, all that is necessary is that the activities complained of restrain interstate commerce. As this Court said in the *Women's Sportswear* case:

> "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." (p. 464.)

In the instant case, the trial court held that the Government had failed to allege that interstate commerce in lath-

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ing materials feels any pinch. Unlike the lower court in the *Women's Sportswear* case, which based its dismissal "chiefly on the grounds that the accused Association and its members were not themselves engaged in interstate commerce," the trial court in the instant case based its order of dismissal on the Government's failure to allege any effects of appellees' activities on the interstate commerce allegedly involved.

In its memorandum opinion, the trial court said: (R. 23-24)

> "There is no allegation of any effect of the alleged intrastate conspiracy upon the interstate market price of the building material involved. There is no allegation of any discrimination or anything that would cause a purchaser to buy building material in Wisconsin or in Chicago or in California. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. * * *
>
> "* * * *It is purely conjectural whether the practice with which the defendants are charged may remotely and indirectly effect the flow of interstate commerce.* It might be that it has reduced the number of buildings that are built in three counties in Illinois; it might be it has driven building and industry elsewhere; but that is not alleged. * * *
>
> "There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There is no allegation of fact that it does so burden interstate commerce." (Emphasis added.)

Appellant argues at page 22 of its brief that the charge of effect on interstate commerce is not "defective by reason of failure to set forth a precise blueprint or detailed catalogue of such effect * * *" and proceeds to assert that "The allegations here are at least as specific as those held to be adequate in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219."

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There is no foundation whatsoever for the foregoing statement. The heart of the amended complaint in the *Mandeville* case is set forth in footnote No. 6 of this Court's opinion at page 226 of 334 U.S. Paragraph XIX of that amended complaint was as follows:

> "By reason of the foregoing acts of the defendants and its said conspirators, *interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened, but was destroyed, the price of sugar beets was illegally fixed,* and an illegal monopoly was established, all in violation of the anti-trust laws of the United States to the damage of plaintiffs as aforesaid." (Emphasis added.)

There is in the instant complaint no comparable allegation that competition in interstate commerce in lathing materials was lessened, substantially or otherwise. Nor is there any allegation of price-fixing. There is nothing in the Government's complaint in the instant cause which even remotely approaches the definiteness of the foregoing allegation in the *Mandeville* complaint, which is, perhaps the least specific and least factual of all the allegations in that complaint.

This defendant does not maintain that the Government must set forth a "precise blueprint" or a "detailed catalogue" of the effects on interstate commerce. Details are certainly unnecessary, but the allegation of the *effects* themselves is essential. As has been demonstrated, the complaint alleges nothing but the vague, generalized and indefinite conclusion that interstate trade and commerce in lathing and related building materials has been unlawfully restrained [par. 29(e), R. 9]. Not one word is alleged which indicates how or to what extent this interstate commerce is restrained.

If, as the Government states in paragraph 18 (R. 5) of its complaint, *any* restraint upon or disruption in or interfer-

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ence with the performance of lathing work in the Chicago area *necessarily* and *directly* restrains and affects the interstate flow of lathing materials, these restraints and effects could easily have been pleaded. What are these effects which are so necessary and direct? Was the flow of materials reduced? If so, the Government should say so. Were the prices of the materials increased or fixed? If so, the Government should say so.

If the alleged conspiracy is unlawful because it intended to achieve unlawful ends, then those intentions must be alleged. If it is unlawful because it had unlawful effects, then those effects must be alleged. In the case at bar the Government has alleged neither.

C. The Government's Brief Fails to Show How a Local Conspiracy Which Does Not Restrain Interstate Commerce Violates the Sherman Act.

The Government devotes much of its brief developing the obvious point that a local conspiracy may violate the Sherman Act if it restrains interstate commerce. To this end it cites, among other cases, *U.S.* v. *Women's Sportswear Mfrs. Ass'n.*, 336 U. S. 460; *Lorain Journal Co.* v. *U.S.*, 342 U.S. 143; and *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219.

This appellee does not dispute the validity of this proposition as a general principle of anti-trust law. The major premise of the Government's syllogism is conceded. But the Government has proceeded directly to its conclusion without stating in its complaint the necessary minor premise, to wit, that the locally-aimed conspiracy of local parties in the instant cause is intended to restrain or has in fact the effect of restraining interstate commerce in lathing materials. It is respectfully submitted that the Government's "logic" is illogical.

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The Government states (Brf. 24-25):

> "• • • both economic fact and controlling precedent must be ignored to conclude that, because they are 'local,' restraints in the building trades *cannot* affect the interstate flow of materials which move for the single purpose of use in these trades. And only such a fallacious conclusion could explain the decision below."

No such contention has ever been advanced by appellees, nor did the trial court rest its decision on such tenuous grounds. We would remind the appellant, however, that it is incumbent on the Government, as it is on every plaintiff, to allege a claim which relief can be granted.

None of the cases relied on by the Government holds that a local conspiracy, neither aimed at nor in fact effecting restraints on interstate commerce, violates the Sherman Act. On the contrary, the essence of each case cited is the holding that the local conspiracy involved clearly *did* restrain interstate commerce. In the *Women's Sportswear* case, for instance, the Court said of the operation in question, at pages 461 and 462 of 336 U.S.:

> "That the jobbers maintain a current of commerce, substantial in volume and interstate in character, seems clear. • • • *At least 80% of the finished sportswear is sold and shipped to customers outside of that State.* Thus the industry in Massachusetts subsists on a constant influx of cloth *and outgo of garments* which pass through the hands of the stitching contractors for an essential operation." (Emphasis added.)

The Court found that the "cost of this contractor's operation is about 25% of the jobber's sale price, and its variations are reflected in wholesale and retail prices." (p. 462). Thus the restrictive practices of the defendants manifested themselves in the prices of the 82% of the garments shipped out of Massachusetts, after defendants had worked on them,

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and sold in other states. The Court said (p. 464): *"The business affected by the restraint is interstate commerce."* This determination by the Court was clearly correct because in the *Women's Sportswear* case, unlike the case at bar, interstate shipments followed the point at which the defendants' activities occurred, and the restraints imposed by the defendants therefore directly affected prices in the interstate market for the goods there involved. No such effect on the interstate flow of lathing materials has been alleged in the complaint at bar.

In *Lorain Journal Co.* v. *United States*, 342 U. S. 143, the defendant's attack on interstate commerce was found to be intended and actual. In that case, the defendant newspaper was attempting to force a competing radio station out of business. The Court held (p. 151) that, "• • • the immediate dissemination of news gathered from throughout the nation or the world by agents specially organized for that purpose is a part of interstate commerce." Accordingly, the Court held that the defendant's efforts to force the competing radio station out of business constituted an attempt to monopolize a part of interstate commerce under the Sherman Act.

Contrast the instant case where appellees are not alleged to be themselves engaged in interstate commerce. They have no dealings across state lines, as do newspaper publishers and radio station operators engaged in the immediate dissemination of news. They do not import lathing materials from other states, as newspapers import news and advertising. Nor do they sell lathing materials as newspapers sell the news and advertising they have imported. The irrelevance of the *Lorain Journal* case in this proceeding is apparent, despite the Government's efforts to give the case a significance it does not have.

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The Government cites *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, but neglects to point out the peculiarly high degree of integration of the interstate and intrastate phases of the beet sugar industry, a point which was repeatedly emphasized by the Court. At page 225, the Court referred to *"the industry's unique structure and special mode of operation."* (Emphasis added.) Again at page 239, the Court said: "We deal here, • • • with *an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar."* (Emphasis added.)

The Government also neglects to state that the Court distinguished the type of case now at bar by saying at page 234:

> "• • • the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, *except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of facts presented.* • • •" (Emphasis added.)

To amplify this statement the Court, in footnote No. 14, quoted from *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, and listed among the cases cited there, *Industrial Association* v. *United States*, 268 U. S. 64, and *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. It is in the category of these cases that the case at bar clearly falls.

The Government relies heavily, but erroneously, on *National Labor Relations Board* v. *Denver Building Council*, 341 U. S. 675, which has no application whatever to the instant proceeding. The statute there involved was the Labor Management Relations Act, 1947, (the Taft-Hartley Act), 61 Stat. 136, 29 U. S. C. (Supp. III) 141, *et seq.*,

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Section 10(a) of which empowers the National Labor Relations Board to prevent unfair labor practices "affecting commerce." Section 2(6) defines commerce as "trade, traffic, commerce, transportation or communication among the several States * * *." Section 2(7) defines the term "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." It is clear, therefore, that the Taft-Hartley Act is concerned with impediments to transportation between the states, and not, like the Sherman Act, with market restraints on interstate commerce. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, established this important distinction.

At the time of the Apex strike 130,000 dozen pairs of finished hose, valued at $800,000.00, were on hand ready for shipment, chiefly to other states, on unfilled prior orders. During the strike the defendants refused to permit any shipments from this stock. There was no doubt that the defendants intended to, and actually did, restrain the interstate flow of hosiery. Nevertheless, the Court held that the defendants were not liable under the Sherman Act merely because they obstructed shipments among the several states. The Court concluded that the strikers' activities, although obstructing transportation, did not exert on the interstate market there involved the type of restraint at which the Sherman Act is aimed.

In the *Denver Building Council* case, there was a finding of fact (pp. 683-684) that "any widespread application of the practices here charged might well result in substantially decreasing the influx of materials into Colorado from outside the State * * *." Jurisdiction under the Taft-Hartley Act concept of "affecting commerce" was clear. But

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the *Apex* case squarely holds that the mere fact that interstate commerce is so "affected" is insufficient to invoke the Sherman Act.

It is interesting to note that even if the complaint in the instant case were tested by the irrelevant standard of the Taft-Hartley Act, it would be insufficient for the reason that the Government has not alleged that appellees' activities substantially decrease the influx of lathing materials into Illinois.

The foregoing analysis applies with equal accuracy to *Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, and *Carpenters Union* v. *National Labor Relations Board,* 341 U. S. 707, also relied upon by the Government.

The specter of the building industry running amuck is raised by the Government at pages 23 and 24 of its brief. Numerous cases are cited showing that the Anti-Trust Division has been hard at work enforcing the Sherman Act in this industry. We commend the Anti-Trust Division for its diligence, but we would remind it that it is the complaint in the case at bar which is in issue. In determining the validity of the instant complaint we are certain that this Court will not remedy the Government's omissions by imputing to these appellees the acts and practices of persons and organizations not parties to this lawsuit.

This Court has never found a violation of the Sherman Act in the absence of an actual or intended restraint on interstate commerce. Yet that is exactly what the Government now asks the Court to do. The Government here seeks to apply the Sherman Act to an intrastate conspiracy without alleging one fact to show that the activities of the defendants are intended to or do in fact restrain interstate commerce in any way.

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III.

A DECISION UPHOLDING THE COMPLAINT AT BAR WOULD VIRTUALLY EMASCULATE THE LIMITED CLAYTON ACT EXEMPTION REMAINING AFTER THE ALLEN BRADLEY CASE.

The effort of the Government in the case at bar is clearly recognized as an attempt further to whittle away at the exemption granted this appellee-union by Section 6 of the Clayton Act, 38 Stat. 730, 15 U. S. C. 17.[7]

In the absence of a restraint of interstate commerce of the kind banned by the Sherman Act, (See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469), this exemption now applies regardless of whether the unions and their employers work with material which originates in the same state or with material which originates in other states. See *United States* v. *International Hod Carriers & Common Laborers' District Council, et al.*, 313 U. S. 539, affirming *United States* v. *Carrozzo*, 37 F. Supp. 191 (N. D. Ill. E. D.).

Allen Bradley Co. v. *Local Union No. 3*, 325 U. S. 797, held that a labor union which combined with employers to raise prices and control the market for electrical equipment sold and distributed in interstate commerce thereby lost its Clayton Act exemption and hence violated the Sherman Act.

The scope of the exemption conferred by Section 6 of the Clayton Act was considerably restricted by the *Allen*

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[7] Section 6 of the Clayton Act provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock, or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

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Bradley case. After the decision in that case, the Anti-Trust Division could successfully prosecute a labor union under the Sherman Act by alleging (a) that the labor union has combined with an employer and (b) that this combination exerted on interstate commerce the kind of restraints banned by the Sherman Act. The Government seeks in the instant case to do away with the requirement that a restraint of interstate commerce be shown, and to substitute for that now essential allegation a statement that the employer-union combination uses materials originating in other states and the conclusion that anything which disturbs the performance of the work "necessarily and directly" restrains the interstate flow of the materials involved.

The instant case, unlike the *Allen Bradley* case, is not alleged to involve the imposition of a restraint on an interstate market. It involves only a union-employer agreement limited in purpose and scope to intrastate services and to the conditions under which the union members are willing to work for the employers. To hold that this agreement is a conspiracy in restraint of interstate commerce merely because those who are parties to it use material from other states, not belonging to either of them, would be virtually to emasculate the limited Clayton Act exemption remaining after the *Allen Bradley* case. Such a decision would seemingly subject every collective bargaining agreement in the building trades industry to review by the Anti-Trust Division, since practically every building trades union handles materials originating in interstate commerce.

To make the availability of the Clayton Act exemption to this appellee dependent solely on whether the local union-employer combination uses materials originating in other states is tantamount to holding that local building trades-

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men and local building trades unions are themselves engaged in and a part of interstate commerce.

Despite the realities of the facts in the case at bar and despite the authority to the contrary, the Government has stretched painfully to bring the concept of interstate commerce into this case. Common sense cries out against this attempt to distort the intent of Congress and to circumvent the constitutional limitations on the federal jurisdiction. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 495; *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434.

The conduct alleged in the instant complaint is purely local, and the alleged combination is stamped only with an intrastate character. Whether or not *any* disruption in the performance of lathing work in the Chicago area "necessarily and directly" restrains the interstate flow of lathing materials, the local conspiracy alleged is far beyond the intent of the Sherman Act. As Justice Cardozo said in his concurring opinion in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, at 554:

> "• • • There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. • • • Activities local in their immediacy do not become interstate and national because of distant repercussions. • • • To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

The majority opinion of the Court stated the same proposition in the following language, at page 548 of 295 U. S.:

> "• • • the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.

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Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

Conclusion.

For the foregoing reasons, the judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

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Appellee.

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